RECORD AND BRIEF

Supreme Court, U.S.
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No. 15-1293

In the Supreme Court of the United States

Michelle K. Lee, Under Secretary of Commerce for Intellectual Property and Director, United States Patent and Trademark Office,
Petitioner,

v.

Simon Shiao Tam,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE CATO INSTITUTE AND A BASKET OF DEPLORABLE PEOPLE AND ORGANIZATIONS AS *AMICI CURIAE* SUPPORTING RESPONDENT

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Library of Congress

QUESTION PRESENTED

Does the government get to decide what's a slur?

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Bradwell v. Illinois,
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Buck v. Bell,
274 U.S. 200 (1927) 27

Buckley v. Valeo,
424 U.S. 1 (1976) 3

Cohen v. California,
403 U.S. 15 (1971) 12

Davenport v. Wash. Educ. Ass'n,
551 U.S. 177 (2007) 24, 25

Dred Scott v. Sandford,
60 U.S. 393 (1856) 27

Erznoznik v. Jacksonville,
422 U.S. 205 (1975) 34

Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm'n, 597 Fed. Appx. 342 (6th Cir. 2015) 4A

In re In Over Our Heads,
No. 755,278, 1990 WL 354546 (T.T.A.B. 1990) 13

Leathers v. Medlock,
499 U.S. 439 (1991) 28

National Endowment for the Arts v. Finley,
524 U.S. 569 (1998) 24

National Socialist Party of America v. Village of Skokie, 432 U.S. 43 (1977) 30

Perry v. Sindermann,
408 U.S. 593 (1972) 22, 28

Plessy v. Ferguson,
163 U.S. 537 (1896) 27

Pro-Football, Inc. v. Blackhorse,
112 F. Supp. 3d 439 (E.D. Va. 2015) 32

Regan v. Taxation With Representation of Wash.,
461 U.S. 540 (1983) 24

Rust v. Sullivan,
500 U.S. 173 (1991) 24

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board, 502 U.S. 105 (1991) 28, 29

Snyder v. Phelps,
562 U.S. 443 (2011) 34

United States v. American Library Ass'n,
539 U.S. 194 (2003) 24

Walker v. Texas Div., Sons of Confed. Veterans, Inc.,
135 S. Ct. 2239 (2015) 26

Williams v. Rhodes,
393 U.S. 23 (1968) 3

Ysursa v. Pocatello Educ. Ass'n,
555 U.S. 353 (2009) 24

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 8 28

Statutes

15 U.S.C. § 1127 29

Other Authorities

11 Brand Names that Simply Couldn't Survive the Times, Adweek, March 18, 2015 http://bit.ly/1x0jkRb 21

Alexandra Petri, *Literally, Joe Biden*, Wash. Post, Sept. 7, 2012, http://wapo.st/2hpA521 30

Amy Chozick, *Hillary Clinton Calls Many Trump Backers 'Deplorables,' and G.O.P Pounces*, N.Y. Times, Sept. 10, 2016, http://nyti.ms/2cCNnXd 2

Barack Obama's Speech on Father's Day, June 15, 2008, available at http://bit.ly/2ggKS0H 9

Cavalier, Encyclopedia Britannica (11th ed. 1911), http://bit.ly/2gZ14BT 4

Christopher M. Fairman, *Fuck: Word Taboo and Protecting Our First Amendment Liberties* (2009) 20

Don Reisinger, *Isis Wallet Becomes Softcard to Avoid Confusion with Militant Group*, CNET, Sept. 3, 2014, http://cnet.co/2gzkfSf 21

Dyke Life: From Growing Up to Growing Old, a Celebration of the Lesbian Experience (Karla Jay, ed. 1996) 7

Elizabeth Wurtzel, *Bitch: In Praise of Difficult Women* (1998) 7

Eric Bogosian, *Chris Rock Has No Time for Your Ignorance*, N.Y. Times Magazine, Oct. 5, 1997, http://nyti.ms/2g5SO6c 9

Erik S. Jaffe, *When Easy Cases Make Bad Law*, 2006–2007 Cato Sup. Ct. Rev. 115 (2007) 25

Eve Ensler, *The Vagina Monologues* (1998) 7

"Hillbilly," Wikipedia, http://bit.ly/2h1QjBa 4

Inga Muscio, *Cunt: A Declaration of Independence* (1998) 7

J.D. Vance, *Hillbilly Elegy* (2016) 4

Jeremy Gordon, *The Band Formerly Known as Viet Cong Announce New Name*, Pitchfork.com, (April 21, 2016), http://bit.ly/1rp03b8 21-22

Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 Conn. L. Rev. 209 (1993) 14

Jerry L. Martin, *Should Alumni Remain Silent?*, 8 Academic Questions 70 (1995) 14

Jim Goad, *The Redneck Manifesto* (1997) 7

Jimmy Stamp, *Political Animals: Republican Elephants and Democratic Donkeys*, Smithsonian.com (Oct. 23, 2012), http://bit.ly/2gzmfKa 4

Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a "Faker," He Says She Should Resign*, Cnn.com, July 11, 2016, http://cnn.it/29zSCUS 3

John McWhorter, *"Tar Baby" Isn't Actually a Racist Slur*, The New Republic, Aug. 3, 2011, http://bit.ly/2gYZpMJ 15

John McWhorter, *Is "Colored People" a Slur?*, CNN.com, Aug. 23, 2016, http://cnn.it/2bTCp2f .. 16

Jonathan Eig, *This Woman Wants You to Call Her Bastard*, Offspring, June/July 2000 7

Kathleen Bishop, *Cracker Day Fun for All*, Flagler-Palm Coast Community Times, Mar. 29, 2000 8

Katy Steinmetz, *Everything You Need to Know About the Word 'Suffragette'*, Time, Oct. 22, 2015, http://ti.me/2he2Cvn 4

List of Schools that Changed Native American Nicknames, USA Today, Sept. 24, 2013, http://usat.ly/2gzt5zl 20

Louis Leroy, Visual Arts Encyclopedia (last visited Dec. 2, 2016), http://bit.ly/2h32pKO 4

Margery Post Abbott et al., *Historical Dictionary of the Friends (Quakers)* (2003) 3

Mario Sevilla, *Lohan Calls Obama "Colored," NAACP Says No Big Deal*, Mercury News, Nov. 12, 2008, http://bayareane.ws/2h2btxc 16

Mark Mooney, *'Yankee Doodle Dandy' Explained and Other Revolutionary Facts*, ABC News, July 4, 2014, http://abcn.ws/1zcxHQk 4

Mary Fairchild, *Methodist Church History*, About.com (last updated Dec. 2, 2016), http://abt.cm/2g5TWGZ 3

Matt Richards & Mark Langthorne, *Somebody to Love: The Life, Death, and Legacy of Freddie Mercury* 127 (2016) 11

Merriam-Webster's Dictionary, http://bit.ly/1LrwxH1 15

Michael du Plessis & Kathleen Chapman, *Queercore: The Distinct Identities of a Subculture*, 24 College Lit. 45 (1997) 11

Michael Thomas Ford, *That's Mr. Faggot to You: Further Trials from My Queer Life* (1999) 7

Michael Warner, *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life* (1999) 7

Moriah Balingit, *School District Weighs Ban of 'Mockingbird,' 'Huckleberry Finn' after Complaint*, Wash. Post, Dec. 3, 2016, http://wapo.st/2gGFmSJ 18

N.W.A., "Straight Outta Compton" on *Straight Outta Compton* (Ruthless Records 1988) 11

Niggas vs. Black People, in Chris Rock, *Rock This!* (1997) 8-9

Pansy Division: Life in a Gay Rock Band (Last Rites Productions 2008) 11

Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word* (2002) ..... *passim*

Randall Kennedy, *Who Can Say 'Nigger'? And Other Considerations*, 26 J. of Blacks in Higher Educ. 86 (2000) 17

Rare Edition of 'Mein Kampf' Stolen, UPI, Sept. 22, 1991, http://bit.ly/2g5PCHS 30

Reid Neilson, *Exhibiting Mormonism: The Latter-day Saints and the 1893 Chicago World's Fair* (2011) 3

Seinfeld, *The Yada Yada* (first aired April 24, 1997) 5-6

Society of Jesus, Catholic Encyclopedia (1913), http://bit.ly/2gN6i63 3

South Park, *It Hits the Fan* (first aired June 20, 2001) 17

South Park, *With Apologies to Jesse Jackson* (first aired March 7, 2007) 9-10, 18

Stephen Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 Trademark Reporter 661 (1993) 13, 31

Straight Outta Compton (Universal Pictures 2015) 11

Ta-Nehisi Paul Coates, *Why "Tar Baby" Is Such a Sticky Phrase*, Time, Aug. 1, 2006, http://ti.me/2h2Zfqk 15

The Vagina Monologues (HBO Films 2002) 8

Trump: Mexico Not Sending Us Their Best; Criminals, Drug Dealers And Rapists Are Crossing Border, RealClearPolitics, June 16, 2015, http://bit.ly/1GNRCpd 2

Yolanda Woodlee, *D.C. Mayor Acted "Hastily," Will Rehire Aide*, Wash. Post, Feb. 4, 1999, http://wapo.st/1j4yg7V 15

INTEREST OF *AMICI CURIAE*[1]

Amici are the following organizations and individuals, whose biographies appear in the appendix: the Cato Institute, P.J. O'Rourke, Nadine Strossen, Erik Nielson, Clay Calvert, Ralph Steadman, Flying Dog Brewery, the Comic Book Legal Defense Fund, DKT Liberty Project, and Reason Foundation.

Amici are committed to preserving free expression and pushing people out of their comfort zones. This case concerns *amici* because we all say things that some people find offensive or even disparaging—but it's not the government's role to make that judgment.

SUMMARY OF ARGUMENT

This case is about whether an Asian-American rock band called The Slants can trademark and own their own name. The Slants are a group of artists who have formed an identity "to take on these stereotypes that people have about us, like the slanted eyes, and own them." Resp. Cert. Brief 3. Some agree with The Slants' approach and some disagree, as is normal in a robust artistic marketplace. What's not normal is that the government has chosen sides in this debate, punishing The Slants for their choice of name by denying them federal trademark registration.

This punishment is the result of the "disparagement clause" in the federal trademark statute, the Lanham Act, which bars the registration of "matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them

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[1] Rule 37 statement: Both parties lodged blanket consents to the filing of *amicus* briefs. Further, no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* funded its preparation or submission.

into contempt or disrepute." Pet. App. 6a. As artists know, the denial of trademark registration comes with severe negative consequences, since the "benefits of registration are substantial." *B&B Hardware, Inc. v. Hargis Industries, Inc.*, 135 S. Ct. 1293, 1310 (2015). Faced with this potential punishment, many artists, advocacy groups, and businesses will simply choose a different name. The government's rule thus discourages some names and encourages others.

This Court should make the jobs of the employees at the U.S. Patent and Trade Office (PTO) much easier and put an end to the disparagement clause. Trying to stamp out "disparaging" speech is both misguided and unconstitutional. No public official can be trusted to neutrally identify speech that "disparages." Moreover, disparaging speech has been central to political debate, cultural discourse, and personal identity for as long as this country has existed.[2]

Disparaging epithets long ago entered our political vocabulary, encapsulating criticisms more succinctly than any polite term ever could. Schoolchildren today learn that Millard Fillmore ran for president in 1856 as the candidate of the "Know-Nothing" Party; few adults could tell you the party's "real" name. Yet a hypothetical 1856 PTO would likely have denied registration to a group called "Defeat the Know-Nothings" (disparaging to American Party members),

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[2] For example, we recently concluded a presidential campaign in large part defined by pronouncements that large groups of people found to be personally disparaging. *See, e.g., Trump: Mexico Not Sending Us Their Best; Criminals, Drug Dealers And Rapists Are Crossing Border*, RealClearPolitics, June 16, 2015, http://bit.ly/1GNRCpd; Amy Chozick, *Hillary Clinton Calls Many Trump Backers 'Deplorables,' and G.O.P Pounces*, N.Y. Times, Sept. 10, 2016, http://nyti.ms/2cCNnXd.

just as the real PTO has denied registration to "Abort the Republicans" (disparaging to Republicans), "Democrats Shouldn't Breed" (disparaging to Democrats), and a logo consisting of the communist hammer-and-sickle with a slash through it (disparaging to Soviets). Pet. App. 8a. Political speech, including the right to criticize parties and politicians without government punishment, is recognized by this Court as "at the core of our electoral process and of the First Amendment freedoms." *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968)).[3] Thus, denial of a statutory trademark right represents particularly egregious government action that violates the First Amendment.

But the suppression of political speech is not the only problem arising from the disparagement clause. As this case shows, supposedly "disparaging" speech is often part of an effort to reclaim a word from its pejorative meaning. Efforts like this have already had a profound influence on the development of many groups' identities. Jesuits, Methodists, Mormons, and Quakers owe their popular names to terms that were originally given to them in a disparaging context, and that have since been reclaimed.[4] Without disparaging

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[3] Indeed, questioning the character of our politicians is such a cherished American tradition that a member of this Court recently engaged in it herself. *See* Joan Biskupic, *Justice Ruth Bader Ginsburg Calls Trump a "Faker," He Says She Should Resign*, CNN.com, July 11, 2016, http://cnn.it/29zSCUS.

[4] *See Society of Jesus*, Catholic Encyclopedia (1913), http://bit.ly/2gN6i63; Mary Fairchild, *Methodist Church History*, About.com (last updated Dec. 2, 2016), http://abt.cm/2g5TWGZ; Reid Neilson, *Exhibiting Mormonism: The Latter-day Saints and the 1893 Chicago World's Fair* 24 (2011); Margery Post Abbott et al., *Historical Dictionary of the Friends (Quakers)* xxxi (2003).

epithets, our vocabulary would be deprived of such terms as "cavalier," "yankee," "impressionist" (Renoir, not Rich Little), and "suffragette."[5] How did a donkey become the Democratic Party symbol? A political opponent labeled Andrew Jackson a "jackass," so Jackson put the animal on campaign posters. *See* Jimmy Stamp, *Political Animals: Republican Elephants and Democratic Donkeys*, Smithsonian.com (Oct. 23, 2012), http://bit.ly/2gzmfKa. An 1820s PTO might have stopped him.

More recently, the author of the bestselling *Hillbilly Elegy* (2016) narrated his escape from the hollows of Kentucky to help explain our populist political moment. J.D. Vance does for "hillbillies"—a term even Wikipedia considers to be derogatory, http://bit.ly/2h1QjBa—what David Brooks did for "bobos" (bourgeois bohemians): explain conversationally an important yet disturbing slice of Americana.

Rock bands in particular often pick names *because* they are "disparaging." The Slits, the Queers, Queen, Pansy Division, N.W.A. (Niggaz Wit Attitudes), and the Hillbilly Hellcats—there's that word again—are just a few examples. Other bands, looking to push the envelope both musically and culturally, have chosen names like the Sex Pistols, Dead Kennedys, Butthole Surfers, Rapeman, Snatch and the Poontangs, Pussy Galore, Dying Fetus, and many, many more.

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[5] *Cavalier*, Encyclopedia Britannica (11th ed. 1911), http://bit.ly/2gZ14BT; Mark Mooney, *'Yankee Doodle Dandy' Explained and Other Revolutionary Facts*, ABC News, July 4, 2014, http://abcn.ws/1zcxHQk; *Louis Leroy*, Visual Arts Encyclopedia (last visited Dec. 2, 2016), http://bit.ly/2h32pKO; Katy Steinmetz, *Everything You Need to Know About the Word 'Suffragette'*, Time, Oct. 22, 2015, http://ti.me/2hc2Cvn.

Further, the disparagement clause is unconstitutionally vague. Its application will always be unpredictable, because nearly any brand could be taken as disparaging by some portion of some group. Take, for low-hanging fruit, Aunt Jemima, Uncle Ben, the Cleveland Indians' Chief Wahoo, the women in La Tortilla Factory, or the Keebler Elves. *Amicus* Flying Dog Brewery has its own history of legal disputes over beer names like "Raging Bitch." *See* next page and appendix. Determining whether a term is disparaging is an incredibly complex endeavor that the government can't possibly be equipped to handle.

For example, one of this brief's authors is a cracker (as distinct from a hillbilly) who grew up near Atlanta, but he wrote this sentence, so we can get away with saying that.[6] Another contributor—unnamed because not a member of the bar—is an Italian-American honky who has always wanted to play in a band called the Dagos, which of course would close every set with "That's Amore" from "Lady and the Tramp." But, with only his great grandparents having come from Italy, is he dago enough to "take back" the term? And *amici*'s lead counsel is a Russian-Jewish émigré who's now a dual U.S.-Canadian citizen. Can he make borscht-belt jokes about Canuck frostbacks even though the first time he went to shul was while clerking in Jackson, Mississippi?[7]

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[6] But he only moved to Atlanta when he was 10 and doesn't have a southern accent—and modern Atlanta isn't really part of the South—so maybe we can't.

[7] In one Seinfeld episode, Jerry is concerned that a friend who recently converted to Judaism did it "just for the jokes":

Jerry: And then he asked the assistant for a schtickle of fluoride.

It gets complicated. And that's the point. The disparagement clause places an unconstitutional condition on those who consider the use of an edgy or taboo phrase to be part of their brand.

None of the government's justifications for an exception to the doctrine carry weight: registering a trademark is not a public subsidy or endorsement. The Court should recognize that trademarks are in no way official speech and reaffirm that the government may not put its thumb on the scale to push controversial viewpoints out of the public square.

Elaine: Why are you so concerned about this?

Jerry: I'll tell you why. Because I believe Whatley converted to Judaism just for the jokes.

Jerry: So Whatley said to me, "Hey, I can make Catholic jokes, I used to be Catholic."

. . .

Jerry: Don't you see what Whatley is after? Total joke telling immunity. He's already got the two big religions covered, if he ever gets Polish citizenship there'll be no stopping him.

Seinfeld, *The Yada Yada* (first aired April 24, 1997).

ARGUMENT

I. "DISPARAGING" LANGUAGE SERVES AN IMPORTANT ROLE IN OUR SOCIETY

A. Reclaiming Slurs Has Played a Big Part in Personal Expression and Cultural Debate

The PTO has inserted itself into a cultural debate. It's no secret that for centuries, people have used language to ridicule and debase. Slurs have been used to stereotype groups, to label its members as inferior, and to express contempt in a universal shorthand. But for just as long, some of the people in these very groups have decided that the explosive power of these charged words does not have to be monopolized by those who seek to demean.

As Randall Kennedy has described, these people "have thrown the slur right back in their oppressors' faces. [Blacks] have added a positive meaning to *nigger*, just as women, gays, lesbians, poor whites, and children born out of wedlock have defiantly appropriated and revalued such words as *bitch*, *cunt*, *queer*, *dyke*, *redneck*, *cracker*, and *bastard*." Randall Kennedy, *Nigger: The Strange Career of a Troublesome Word* 38 (2002).[8]

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[8] Kennedy cites, as examples, Michael Thomas Ford, *That's Mr. Faggot to You: Further Trials from My Queer Life* (1999); Michael Warner, *The Trouble with Normal: Sex, Politics and the Ethics of Queer Life* (1999); Eve Ensler, *The Vagina Monologues* (1998); Inga Muscio, *Cunt: A Declaration of Independence* (1998); Elizabeth Wurtzel, *Bitch: In Praise of Difficult Women* (1998); Jim Goad, *The Redneck Manifesto* (1997); *Dyke Life: From Growing Up to Growing Old, a Celebration of the Lesbian Experience* (Karla Jay, ed. 1996); Jonathan Eig, *This Woman Wants You to Call Her Bastard*, Offspring, June/July 2000;

Artists who choose to use such charged words do not always reach this decision easily. Frequently, their works reflect the artists' own attempts to grapple with a word, revealing precisely the debates and disagreements that make the choice to use it—if such a choice is made—so charged and powerful. *See, e.g.*, The Vagina Monologues (HBO Films 2002):

> [An audience member] also told me in the course of our conversation that I had said something negative about a particular word, a pejorative word, a word that's been used to declaim the vagina, and she needed to help me reconceive this word. So, for the next hour, she talked to me about this word. And when she was done, I was a convert. I wrote this for her. I call it: "Cunt." I've reclaimed it. "Cunt." I really like it. "Cunt." Just listen to it, listen to it: "Cunt."

Such debates, among artists and within one artist's body of work, would be impossible without a clear-throated acknowledgment of the words themselves.

This is not to say that the only meaningful cultural debates over the use of slurs and taboos words centers around purely positive reclamations. In some cases, artists and comedians have harnessed their power to send a critical message. For example, one of the most groundbreaking stand-up routines ever recorded, Chris Rock's "Niggas vs. Black People," engaged in cultural commentary that put some African Americans in a negative light—indeed, "disparaged" them. *See Niggas vs. Black People*, in Chris Rock,

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Kathleen Bishop, *Cracker Day Fun for All*, Flagler-Palm Coast Community Times, March 29, 2000.

Rock This! 17–19 (1997). Many questioned and criticized both Rock's approach and, specifically, his use of "the N-word." *See, e.g.*, Eric Bogosian, *Chris Rock Has No Time for Your Ignorance*, N.Y. Times Magazine, Oct. 5, 1997, http://nyti.ms/2g5SO6c. ("Your audience is made up of whites, many of whom are happy to hear how lazy or stupid blacks are. You're using the word 'nigger.' And some of the white audience is saying, 'That's right.' . . . 'Nigger' is a heavy-duty word. You better have a good reason for using it."). Yet the routine had such cultural resonance that 12 years later it was cited positively by an African-American presidential candidate. *See* Barack Obama's Speech on Father's Day, June 15, 2008, available at http://bit.ly/2ggKS0H. ("Chris Rock had a routine. He said some—too many of our men, they're proud, they brag about doing things they're supposed to do. They say 'Well, I'm not in jail.' Well you're not supposed to be in jail!"). The 12-minute riff was undoubtedly an important contribution to an ongoing public debate—and its title and message undoubtedly would have been rejected by the PTO.

Of course many in the African-American community continue to disagree with comedians' decision to use racial epithets. Such disagreements are to be expected; it would be patronizing to assume that any racial or ethnic group would have a single monolithic view on any controversy.[9] But such disagreements

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[9] Indeed, one harm of the government's approach, which attempts to discern whether a "substantial composite" of a given community has felt disparaged by a mark, is that it will naturally allow certain loud voices in a racial or ethnic community to "speak for" the entire group in determining whether a term has disparaged them. After all, asking a few self-anointed "community leaders" is much easier than ascertaining the sentiments of

over the true meaning and best approach to the use of a word are at the core of First Amendment debate.

We are not arguing—and the Court need not decide—that those who choose to use these words are always correct, whether they use them as a tool of pride or criticism. It is the PTO's rule, by effectively giving a veto power to those who *disagree* with such usage and punishing those who use them, which has impermissibly taken sides in this debate.

B. Rock Music Has a Proud Tradition of Pushing the Boundaries of Expression

Post-war popular music—from rock, to soul, to rap, to R&B, to punk—has consistently pushed the boundaries of expressive propriety. From its very beginnings, rock music has made parents uncomfortable, school teachers cringe, and officials riled up. It wouldn't be rock music if it didn't.

The boundaries of expression are generally congruent with the boundaries of social convention. Many marginalized groups have sought to challenge social conventions by choosing disparaging terms as

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millions of members of a diverse group. *See* South Park, *With Apologies to Jesse Jackson* (first aired March 7, 2007):

Stan: Hey Token. I just wanted to let you know that everything is cool now. My dad apologized to Jesse Jackson.

Token: Oh I see, so I'm supposed to feel all better now.

Stan: Well, yeah.

Token: You just don't get it, Stan!

Stan: Dude, Jesse Jackson said it's okay!

Token: Jesse Jackson is not the emperor of black people!

Stan: (confused) He told my dad he was . . .

band names. The so-called "Queercore" or "Homocore" movement of the '80s, '90s, and 2000s was typified by bands like the Pansy Division, an all-gay rock band that explicitly adopted a disparaging epithet in their name. *See* Michael du Plessis & Kathleen Chapman, *Queercore: The Distinct Identities of a Subculture*, 24 College Lit. 45 (1997); Pansy Division: Life in a Gay Rock Band (Last Rites Productions 2008). When he came up with the name "Queen" for his legendary band, front man Freddie Mercury said he liked the "regal" sound, but he was also "certainly aware of the gay connotations." Matt Richards & Mark Langthorne, *Somebody to Love: The Life, Death, and Legacy of Freddie Mercury* 127 (2016).

"Taking back" disparaging epithets has also been a philosophy of rap and R&B music, both of which use variations of "nigger" in their lyrics and names. N.W.A., one of the most culturally significant groups of the past 30 years, is the most prominent example. Straight Outta Compton (Universal Pictures 2015). They grabbed the slur with pride, announcing to themselves and the world with the brazen opening line, "straight outta Compton, crazy motherfucker named Ice Cube, from the gang called niggaz wit attitudes." N.W.A., "Straight Outta Compton" on *Straight Outta Compton* (Ruthless Records 1988).[10]

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[10] "A cursory survey just of titles yields Dr. Dre's 'The Day the Niggas Took Over,' A Tribe Called Quest's 'Sucka Nigga,' Jay-Z's 'Real Nigger,' the Geto Boys' 'Trigga Happy Nigga,' DMX's 'My Niggas,' and Cypress Hill's 'Killa Hill Nigga.' In 'Gangsta's Paradise,' meanwhile, Coolio declares, 'I'm the kind of nigga little homies want to be like on their knees in the night saying prayers in the streetlights.'" Kennedy, *supra*, at 35–36.

N.W.A. received a trademark for its name. That The Slants have been denied one for theirs only underscores the arbitrary and biased nature of the Lanham Act's disparagement clause.

Finally, band names are also chosen to convey valuable information about the music the band plays. It should come as no surprise that the Queers are not a Lawrence Welk cover band, the Revolting Cocks are not a string quartet, Dying Fetus does not play jazz standards, and Gay Witch Abortion would never open for Paul Anka. Similarly, The Slants have chosen a name that, through its insouciance, expresses something about their music—and the government's jejeune label of "disparaging" fails to capture the many levels of communication inherent in that name.

II. THE GOVERNMENT SHOULD NOT BE DECIDING WHAT'S A SLUR

A. It Is Impossible to Draw an Objective Line as to What Is Disparaging

As the Court has observed, "it is largely because governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual." *Cohen v. California*, 403 U.S. 15, 25 (1971). The history of the disparagement clause is a textbook example of this problem.

In applying the clause, the PTO tries to "look[] at what message the referenced group takes from the applicant's mark in the context of the applicant's use," and then "den[y] registration only if the message received is a negative one." Pet. App. 22a–23a. Even the clause's defenders admit that "[p]redictability . . . is a real problem" and that "those

who are called upon to interpret the disparagement standard of Section 2(a) still are required to ascertain the subjective feelings of others regarding the use of the challenged trademarks." Stephen Baird, *Moral Intervention in the Trademark Arena: Banning the Registration of Scandalous and Immoral Trademarks*, 83 Trademark Reporter 661, 668 (1993). And as the Federal Circuit pointed out, "the PTO [has] admitted that '[t]he guidelines for determining whether a mark is scandalous or disparaging are somewhat vague and the determination of whether a mark is scandalous or disparaging is necessarily a highly subjective one.'" Pet. App. 33a n.6 (quoting *In re In Over Our Heads*, No. 755,278, 1990 WL 354546, at *1 (T.T.A.B. 1990)). *See also id.* at 33a n.7 (listing examples of arbitrary PTO decisions).

Nonetheless, the government assures us that it knows how to draw an objective line as to what is "disparaging." If it seems to contradict itself in registering some marks and denying others, that is only because "analysis of whether a mark is disparaging requires consideration of the mark's meaning in relation to the particular goods and services for which registration is sought and the context in which the mark is used." Pet. Brief 51. For several reasons, we are less sanguine that such a neutral and objective arbiter of true disparagement can be found anywhere, let alone in the federal government.

First, history shows that people have often taken serious offense—that is, received a "negative" message—from words and phrases that also have perfectly innocuous meanings. Consider the infamous Penn "water buffalo" incident:

> Late on a Friday evening at the University of Pennsylvania [in 1993], freshman Eden Jacobowitz was studying in his dormitory room. After midnight, his study was interrupted by some boisterous sorority sisters, who happened to be black, celebrating outside his window. He and other students yelled out their windows at the students. Young Eden shouted, "Shut up you water buffalo!" When a campus judicial officer interrogated him, Mr. Jacobowitz told him what he had yelled and offered to apologize for his rudeness. Nevertheless, he was charged with having violated Penn's speech code prohibiting "racial harassment."

Jerry L. Martin, *Should Alumni Remain Silent?*, 8 Academic Questions 70, 70 (1995).

Since that incident, entire journal articles have been written debating whether this bovine analogy was a racial slur. *Compare* Jerome McCristal Culp, Jr., *Water Buffalo and Diversity: Naming Names and Reclaiming the Racial Discourse*, 26 Conn. L. Rev. 209, 225 (1993) ("In context, it is possible that this statement was in fact meant to be nonracial, but is it quite possible that one could not mistake the racial nature of the statement?") *with* Martin, *supra* at 70 ("[N]o one, including scholars in the university's ethnic studies department, could cite any previous use of the term 'water buffalo' as a racial slur."). If the brightest academic minds can debate whether a term was a racial slur for two decades, what hope does a single lawyer in the Trademark Office have?

There have been similarly intense controversies over the use of the word "niggardly," which has an

entirely innocuous dictionary definition[11] but happens to also sound similar to another word of less innocuous origins. Use of the word has become so controversial that one employee of the D.C. Mayor's Office lost his job for using it in a public meeting. *See* Yolanda Woodlee, *D.C. Mayor Acted "Hastily," Will Rehire Aide*, Wash. Post, Feb. 4, 1999, http://wapo.st/1j4yg7V. *See also* Kennedy, *supra*, at 94–96. What to make of such controversies? Perhaps there are some secret racists who receive a thrill from being able to say "niggardly" out loud and get away with it, like the second-grader who seems to enjoy saying "Hoover Dam" a bit too much. But most, surely, use the word only out of a desire to show that they know their way around a thesaurus. Which definition of "niggardly" would the government use if someone attempted to include the word in a trademark? The dictionary or the dog-whistle? It is hard to know, and that, again, is exactly the problem.

The list of such disputed slurs is endless. Yet more heated debates, for example, have raged over use of the term "tar baby." *See* Ta-Nehisi Paul Coates, *Why "Tar Baby" Is Such a Sticky Phrase*, Time, Aug. 1, 2006, http://ti.me/2h2Zfqk; John McWhorter, *"Tar Baby" Isn't Actually a Racist Slur*, The New Republic, Aug. 3, 2011, http://bit.ly/2gYZpMJ. Once again, the PTO would have us believe that although linguists, historians, and pundits disagree, everyone who works at 600 Dulany Street in Alexandria magically acquires the power to settle these debates.

Yet a further wrinkle is that sometimes the process of reclamation described above can occur in *re-*

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[11] Niggardly (adj.): 1. Grudgingly mean about spending or granting. Merriam-Webster's Dictionary, http://bit.ly/1LrwxH1.

verse. That is, a term formerly considered respectful can evolve to be considered pejorative. Imagine, for example, that an entirely new organization were founded today with the term "colored people" in its name. Would this not at least raise some eyebrows at the PTO? After all, the term has evolved to the point where no one would now use it in polite company; a morning news anchor had to quickly apologize when she slipped up and used it on the air last summer. *See* John McWhorter, *Is "Colored People" a Slur?*, CNN.com, Aug. 23, 2016, http://cnn.it/2bTCp2f. Yet it is also true that, in 1910, the founders of this country's preeminent advocacy organization for African Americans "chose the word 'colored' because it was the most positive description commonly used at that time." *See* Mario Sevilla, *Lohan Calls Obama "Colored," NAACP Says No Big Deal*, Mercury News, Nov. 12, 2008, http://bayareane.ws/2h2btxc (interview with Carla Sims, Communications Director for NAACP in Washington, D.C.). Perhaps the NAACP is right that the term colored is "outdated and antiquated but not offensive." *Id.* But this raises the question: At what point between 1910 and the present would the PTO have ceased granting registration to marks using "colored"?[12] Once again, there is no clear answer.

But these problems of uncertainty are not limited to whether a term should be considered a slur. Even with words that are indisputably pejorative, it is still a complex question whether a given usage is meant to disparage, because of the process of reclamation. People will always, in good faith, disagree as to when, if ever, such "reclamatory" uses are positive for the group in question, and whether their use should be

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[12] *See also* the United Negro College Fund

encouraged or condemned. Even among those who believe that such uses can be valuable, there will be disagreements as to the speakers, settings, and usages that are permissible. *See generally* Randall Kennedy, *Who Can Say 'Nigger'? And Other Considerations*, 26 J. of Blacks in Higher Educ. 86 (2000).[13]

The case of The Slants illustrates precisely this problem. Even though the band is entirely composed of Asian Americans, and even though few doubt that their intentions are good, some in the Asian-American community have disagreed with their approach and objected to their name. *See* Pet. App. 11a.

This opposition should not be surprising. Nearly every use of a taboo word, no matter how well-meaning, will offend some part of the population. In 1926, Carl Van Vechten chose to title his newest novel—a sympathetic and serious portrayal of black life in Harlem—"Nigger Heaven." As Randall Kennedy describes, "The title alone alienated many blacks, including some who knew the author personally. . . . At an antilynching rally in Harlem, a protester burned a copy of *Nigger Heaven*. And in Boston, the book was banned." Kennedy, *supra*, at 101. The inescapable fact is that no matter the intention or artistic merit, the use of such words will always be met with contro-

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[13] *See also* South Park, *It Hits the Fan* (first aired June 20, 2001):

Mr. Garrison:	Well, they can't use "fag." Because you can't say "fag" unless you're a homosexual.
Randy:	Really? So we can't say [bleep]?
Mr. Garrison:	No. See, you got beeped.
Man:	You mean you have to be a [bleep] to say [bleep]?
Mr. Garrison:	That's right.

versy. Prominent African-Americans have, in good faith, earnestly objected to the appearance of racial slurs in everything from *Huckleberry Finn* to Merriam-Webster's Dictionary. *Id.* at 105–12.

The serious risk of such outcry shows that even those who believe that their intentions are good cannot be certain that their trademark will be approved. The government's standard of looking to the sentiments of the community at issue will not necessarily save well-meaning or "valuable" uses of difficult words. Instead, it threatens to give veto power to those voices who complain the loudest—a phenomenon that is not necessarily correlated with the actual number of people who truly object to a term.[14] Since the decision to reject a mark will be skewed toward those cases that have attracted the most public attention and outcry *after* the mark has already been chosen, the actual likelihood of being denied registration is even more unpredictable in advance. The result is that artists will be even more incentivized to "play it safe" and choose names that will be unlikely to generate any controversy—exactly the chilling of speech that makes such arbitrary rules so dangerous.

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[14] *See, e.g.*, South Park, *With Apologies to Jesse Jackson* (Michael Richards, Mark Fuhrman, and the fictional Randy Marsh start a vociferous campaign and successfully lobby Congress to ban the phrase "nigger guy" as a slur against white people who have used the racial epithet. Senator: "From now on, if a person uses the word 'nigger,' it must be at least seven words away from the word 'guy.'"). For a real-life example, *see, e.g.*, Moriah Balingit, *School District Weighs Ban of 'Mockingbird,' 'Huckleberry Finn' after Complaint*, Wash. Post, Dec. 3, 2016, http://wapo.st/2gGFmSJ (describing how school board pulled literary classics pending consideration of permanent ban; also noting an earlier complaint about Toni Morrison's *Beloved*).

For all of these reasons, a "mixed" approach, as proposed by one group of *amici*, would not work. *See* Brief of *Amici Curiae* Asian Americans Advancing Justice | AAJC, et. al., in Support of Neither Party. These a*mici* argue that this Court should leave the disparagement clause largely in place, but strike down its denials of trademarks that are "actually" well-intended. They propose "a more comprehensive and nuanced disparagement analysis that considers both the expressive interest in reclamation and the potential harmful effects of the proposed mark." *Id.* at 3. But the government will never be able to draw such an objective line. Even if it could, the effort would only make the PTO rule *more* blatantly violate the First Amendment, since it would take the viewpoint of a mark's message into account even more.

To avoid such vagueness and unpredictability, the PTO should follow a bright-line rule: make registration decisions based on the merits, not the message.

B. Brands That Do Not Wish to Offend Can Change Their Names Voluntarily

When the government decides that it will be the arbiter of offensiveness, it risks doing exactly what it did here: denying registration to a trademark that has an important contribution to make in expressing identity and breaking down racial stereotypes. So long as it remains in effect, the disparagement clause will continue to swallow up many serious, important, and well-meaning usages of taboo words. Even worse, these harms are the product of a wholly unnecessary governmental mission. The government does not have to step in to defend us against offensive marks, be-

cause the market is best equipped to judge when a brand is truly mean-spirited.[15]

Complaining to the government is not the only way for people truly offended by a title, name, or mascot to influence its creator. In some cases, of course, artists will stick to their guns and keep a title they believe to be important even at the risk of losing sales, as in the case of Carl Van Vechten and *Nigger Heaven*. But in many others, offending their consumers is the last thing market participants want to do. That's why brands have evolved without the need for the government to police their language.

In the 1970s, both Stanford and Dartmouth voluntarily changed their mascots from the "Indians" to the (difficult-to-make-into-a-costume) incorporeal colors "Cardinal" and "Big Green," respectively. Today, dozens of other colleges, motivated by fears of angry donors or triggered students, have replaced similar mascots with equally bland alternatives. *See List of Schools that Changed Native American Nicknames*, USA Today, Sept. 24, 2013, http://usat.ly/2gzt5zl. Whatever one thinks about such changes, they have been accomplished without a bureaucrat's deciding where to draw the line on what's derogatory.

Likewise, brands have voluntarily changed their names when new circumstances suddenly gave formerly innocuous names some entirely new (and unwanted) associations. In 1946, an "appetite suppressing candy" was trademarked with a simple and easy to remember name: Ayds. In the 1970s and early '80s Ayds was part of a popular dieting plan. (Actual slo-

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[15] *See generally* Christopher M. Fairman, *Fuck: Word Taboo and Protecting Our First Amendment Liberties* (2009).

gans included "With Ayds, I ate less!" and "Why take diet pills when you can enjoy Ayds?") By 1986, the AIDS crisis had given the name and slogan an entirely different meaning, and the candy went through a quick—and completely voluntary—rebranding.[16] *See 11 Brand Names that Simply Couldn't Survive the Times*, Adweek, March 18, 2015 http://bit.ly/1x0jkRb. A similar fate more recently befell both Italo Suisse Chocolates when it decided to rebrand as "Isis Chocolates" in 2013, *id.*, and the likewise poorly timed "Isis Wallet." They soon became "Libeert" and "Softcard," respectively. *See* Don Reisinger, *Isis Wallet Becomes Softcard to Avoid Confusion with Militant Group*, CNET, Sept. 3, 2014, http://cnet.co/2gzkfSf.

Then there is the highly acclaimed post-metal band ISIS, now disbanded, who may have run afoul of the disparagement clause had they started their band in 2016 rather than 1997. If the band were still together today, market forces might push them to consider a name change, just as the band formerly known as Viet Cong, now known as Preoccupations, did in 2016. Jeremy Gordon, *The Band Formerly Known as Viet Cong Announce New Name*, Pitchfork.com, (April 21, 2016), http://bit.ly/1rp03b8. Under the name Viet Cong, they elicited controversy and at least one cancelled show. *Id.* In the press release announcing the name change, the band "apologize[d] to those who were adversely affected by our former band name." "This was never anticipated nor our intent[,]" they wrote, "We are artists and not politicians, we understand that the name reflected pain to

[16] The candy became "Aydslim" in Britain and "Diet Ayds" in the United States, before eventually being phased out.

some individuals and we are happy to change it and move on and focus on our music." *Id.*

History thus shows that if the government steps aside, we will have the best of both worlds: Those brands that wish to make money and fear alienating customers (which is most of them) will police themselves. And those brands and artists that wish to be bolder and make an artistic point that is more controversial, like The Slants, will remain free to do so.

III. THE DISPARAGEMENT CLAUSE VIOLATES THE FIRST AMENDMENT

A. The Disparagement Clause Is a Viewpoint-Based Unconstitutional Condition

"Disparaging" words of the type singled out by the PTO have played a valuable role in personal expression and social debate. But the burden is not on those like Simon Tam to show his expression's value. It suffices to say that any mark which can be interpreted as disparaging is clearly *expression*, and that the government is disadvantaging those who identify themselves with such expression. This fact alone is enough to invalidate the disparagement clause under the unconstitutional-conditions doctrine.

This Court has made it clear that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972). The disparagement clause does precisely that. As the Federal Circuit correctly noted, "the disparagement provision at issue is viewpoint discriminatory on its face. The PTO rejects marks under § 2(a) when it finds the marks refer to a group in a negative way, but it per-

mits the registration of marks that refer to a group in a positive, non-disparaging manner." Pet. App. 21a.

The government halfheartedly attempts to hedge on whether it is punishing expression by generalizing trademarks as "source identifiers in commerce that are not inherently expressive." Pet. Brief 47. But such a generalization, even if true, is irrelevant to the constitutional issue. Whenever the disparagement clause comes into play, the particular trademark at issue *must* have an expressive content. It is its expressive content—a perceived disparaging sentiment—that leads to the mark being denied registration.[17]

B. A Trademark Is Neither a Subsidy Nor an Endorsement

To rescue the disparagement clause, the government argues that trademark registration is a discretionary "government program." The government claims that the unconstitutional-conditions doctrine does not apply because when it rejects a trademark, it "is not restricting speech, but instead declining to provide government assistance." Pet. Brief 19. Yet each of the cases cited by the government to support

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[17] In dissent, Judge Reyna offers another strange argument, that marks must not have expressive content because, if they did, trademark law itself would violate the free-speech rights of *nonholders* of a mark. "[I]f the expressive *content* of the mark precludes regulation, on what authority may the government grant Mr. Tam the exclusive right to use this mark in commerce?" Pet. App. 112a–113a (Reyna, J., dissenting). This is like arguing that books must not have any expressive content, because otherwise copyright law would violate the speech rights of those who wish to print someone else's book. Imagine Judge Reyna asking with perplexity "If *Harry Potter and the Deathly Hallows* is expressive speech, on what authority may the government grant J.K. Rowling the exclusive right to print it?"

this proposition dealt with "government programs" that fell into categories much different from the basic protection of trademark registration.

1. Choosing which artists and speakers to fund with limited resources is different than trademark registration.

First, the government cites several cases that specifically concerned *monetary subsidies*. *See* Pet. Brief 15–17 (citing *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540 (1983); *Rust v. Sullivan*, 500 U.S. 173 (1991); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *United States v. American Library Ass'n*, 539 U.S. 194 (2003)). These cases are of no help to the government. Turning down some requests for money is a necessary "consequence of the nature of arts funding." *Finley*, 524 U.S. at 585. The government does not have unlimited funds and therefore unavoidably must make distinctions among artists and speakers it chooses to subsidize. But such a justification plainly does not apply to the granting of a trademark, since "trademark registration is user-funded, not taxpayer-funded," and "the government spends far more significant funds defending its refusal decisions under the statute." Pet. App. 64a.

2. Spending other people's money on political activity is unlike trademark registration.

Since the subsidy cases are of no help, the government cites two additional cases to claim that the "government assistance" exception is not limited to subsides: *Davenport* v. *Wash. Educ. Ass'n*, 551 U.S. 177 (2007) and *Ysursa* v. *Pocatello Educ. Ass'n*, 555 U.S. 353 (2009). *See* Pet. Brief 41. Yet both *Davenport*

and *Ysursa* also differ from this case in a crucial respect: both concerned "a condition placed upon [a] union's extraordinary *state* entitlement to acquire and spend *other people's* money." *Davenport*, 551 U.S. at 187 (emphasis original). That is, both cases involved a restriction on a union's spending "agency shop" fees taken from union nonmembers (specifically, a ban on spending such money on certain types of political lobbying). *Davenport* and *Ysursa* thus both represent highly unusual situations where First Amendment concerns were implicated on *both* sides of the conflict; the "government benefit" itself "also impinge[d] upon the First Amendment rights of [the union's] nonmembers by forcing them to support the speech of the union." Erik S. Jaffe, *When Easy Cases Make Bad Law*, 2006–2007 Cato Sup. Ct. Rev. 115, 116 (2007).

Further, unlike in *Davenport* and *Ysursa*, the disparagement clause discriminates on the basis of *viewpoint*, not just content. The regulation in *Davenport* was "a reasonable, *viewpoint-neutral* limitation on the State's general authorization allowing public-sector unions to acquire and spend the money of government employees." *Davenport*, 551 U.S. at 189 (emphasis added). The disparagement clause here, by contrast, is clearly not viewpoint-neutral.

3. Trademarks are not endorsements.

The government has one more argument: that even if a federally registered trademark is not a government subsidy, it is a government endorsement. The government argues that registration would be perceived as an endorsement because it "would cause the mark to be published on the Principal Register; would cause a certificate for the mark to be issued 'in the name of the United States' (which may be trans-

mitted to foreign countries); and would entitle respondent to use the ® symbol to convey to the public that the mark has an official status." Pet. Brief 39. To support this "endorsement exception," the government primarily relies on *Walker* v. *Texas Div., Sons of Confederate Veterans, Inc.*, 135 S. Ct. 2239 (2015).

In *Walker*, some of the present *amici* believed it was hard to characterize every specialty license plate printed by the state of Texas as an endorsement, given that many gave contradictory and opposing messages (for example, the state apparently endorsed *both* the Oklahoma Sooners *and* the Texas Longhorns). While the Court disagreed, here the government's case for an endorsement is notably weaker even than in *Walker*. Perhaps both sides of a fight can be "endorsed" when the government thinks both sides are valiant and honorable. But even with this low bar, the trademarks that the PTO *has* registered almost certainly do not meet it. It is hard to believe that the position of the federal government is that every trademark it has ever registered is to be respected—considering that this includes such hallowed brands as "Capitalism Sucks Donkey Balls" and "Take Yo Panties Off." *See* Pet. App. 43a.

Further, even though some of the *amici* here didn't think that printing a symbol on a license plate looked like much of a government endorsement, this case presents even *fewer* of the potential trappings of endorsement. Authorized trademarks are not proudly displayed on publicly visible moving vehicles next to the seal of the United States; they are noted in the online Trademark Official Gazette and then filed

away in a register where only some (unlucky) lawyers will ever want to go looking for them.[18]

4. The government is incoherent because it admits that it uses resources to protect both registered and unregistered trademarks.

Finally, the government's position—"Holders of unregistered marks can also invoke the Lanham Act's federal cause of action to protect their marks against misappropriation and consumer confusion." Pet. Brief 20.—is incoherent. There is no principled reason why expending the resources and authority of the federal judiciary to protect an *unregistered* trademark constitutes neither a subsidy nor endorsement of that mark, but expending those same resources to protect a *registered* trademark constitutes both. Registration under the Lanham Act indeed provides significantly more benefits than common-law trademark rights (which is why The Slants and others in their position have been significantly harmed), but the government will be entangled with "disparaging" trademarks no matter what, unless it goes so far as to abrogate even the common-law rights of marks it dislikes.

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[18] The government should be careful if it truly believes that printing a disparaging message on *any* official publication will forevermore be seen as an imprimatur of endorsement for the respectability of the message conveyed—and that this justifies cleansing such publications of all disparaging sentiments. If so, this Court can only hope, for the sake of its own posterity, that the same principle is not eventually extended to another official publication of the federal government that has printed more than a few disparaging sentiments throughout its history: the United States Reports. *See, e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393 (1856); *Bradwell v. Illinois*, 83 U.S. 130 (1872); *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Buck v. Bell*, 274 U.S. 200 (1927).

In the end, there is no justification for departing from the basis for the unconstitutional-conditions doctrine, one that should be decisive here: "[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited." *Perry*, 408 U.S. at 597.

C. Expanding the "Government Assistance" Exception Risks Swallowing the Rule

An artist can survive losing an NEA grant; such funding does not give the government the means to suppress speech. But in most cases, a creator cannot survive being deprived of *all* potential profits from his work. This has been recognized since the time of the Framers, who tasked the new government with "securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" to ensure that such expression is created in the first place. U.S. Const. art. I, § 8, cl. 8.

For the same reason, this Court has recognized that the government cannot deny a normal ownership right in one's own written work. *See Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Board*, 502 U.S. 105 (1991). In *Simon & Schuster*, the Court struck down a state law that "require[d] that an accused or convicted criminal's income from works describing his crime be deposited in an escrow account" and distributed to a crime victims' fund. *Id.* at 108. The Court noted the longstanding rule that "[a] statute is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of their speech." *Id.* at 115 (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)). As the Court held, forbidding authors to prof-

it from books describing their own crimes "plainly imposes a financial disincentive only on speech of a particular content." *Id.* at 116.

The government makes much of the fact that Tam is not banned from uttering the phrase "The Slants" or describing his band by that name. But neither, in *Simon & Schuster*, were authors banned from writing books describing their crimes. By requiring that the profits from such books be forfeited to the state, however, the government removed any financial incentive to author such books.

This Court's precedent in *Simon & Schuster* is largely determinative of this case. Removing normal trademark protections is like removing the ability to own the rights to one's book, or to patent an invention. The purpose of trademark law is "to protect persons engaged in [interstate] commerce against unfair competition." 15 U.S.C. § 1127. If a potential competitor can copy and use a mark, it is more likely that the mark will not be used at all—just as if everyone can copy and sell a book, it is more likely that the book will not be written at all. The disparagement clause thus removes much of the economic incentive a business or artist would have to choose "disparaging" marks as a means of identifying themselves. And such self-identification, especially when it involves a derogatory term often applied to oneself, is undeniably a form of expression unique and separate from simply using the term in some other context.

If trademark protection is simply "government assistance" that can be withheld on the basis of speech content, it is hard to see what basic economic and property protections would *not* qualify as discretionary "government assistance." Indeed, under the gov-

ernment's own proposed rule, any service that Congress or a local legislature is "not obligated to provide"—which is literally the case for *every* service[19]—could be selectively withheld on the basis of speech.

Consider the case of the theft of a valuable early edition of *Mein Kampf*. *See Rare Edition of 'Mein Kampf' Stolen*, UPI, Sept. 22, 1991, http://bit.ly/2g5PCHS. Could the police have declined to provide their discretionary "theft investigation governmental assistance" in such a case, on the basis of a disagreement with the content of the work stolen? ("A museum may choose to display Nazi ideas, but they may not rely on the government to aid them against overzealous souvenir-hunters.")

Or consider this Court's decision in *Nat'l Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977). Could the government grant a permit for a public protest but then selectively withhold the "government assistance" of crowd control or traffic diversion on the basis of the protest's message?

If trademark registration may be withheld based on viewpoint, what government protections could not?

D. The Government May Not Discourage Speech to Protect People from Being "Bombarded" with Opposing Views

The government admits that "the essential function of trademarks is to identify goods and services as emanating from a particular commercial source." Pet. Brief 48. It is hard to understand how the disparagement clause furthers a legitimate PTO goal, then,

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[19] Actual, non-Biden sense of the word "literally." *See, e.g.*, Alexandra Petri, *Literally, Joe Biden*, Wash. Post, Sept. 7, 2012, http://wapo.st/2hpA521.

since "it cannot be contended seriously that scandalous, immoral, and disparaging trademarks fail to promote the well-known purposes underlying trademark law. . . . the protection of the public from deception and the protection of the trademark owner from misappropriation." Baird, *supra*, at 673 & n.40.

Nonetheless, the government argues that it "has a legitimate interest in encouraging the use of non-disparaging marks in interstate commerce, rather than allowing that program to be used to increase the likelihood that 'underrepresented groups in our society' will be 'bombarded with demeaning messages in commercial advertising.'" Pet. Brief 48 (quoting Pet. App. 81a (Dyk, J., concurring in part, dissenting in part)).[20] Such bombardment, it contends, "tends to disrupt commercial activity and to undermine the stability of the marketplace." Pet. Brief 49 (quoting Pet. App. 117a–118a (Reyna, J., dissenting)).

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[20] This is hard to reconcile with the argument that granting a trademark actually *reduces* overall speech by allowing a trademark holder to prevent others from using a mark. *See* Brief of *Amici Curiae* Law Professors Supporting Petitioners, at 2. ("Rather than facilitating public debate, a trademark registration is a government-issued document that makes it easier for its owner to suppress the speech of others.") By that logic, shouldn't the government *prefer* that only one entity can use each epithet? Instead, now those who object to "Slants" must not only fear being "bombarded" by Tam's band, but face the horrifying prospect of dozens of knock-off Slants tribute bands, able to simultaneously trample on Tam's market share and the dignity of the Asian-American community with impunity. The answer to this conundrum is that trademark law, in fact, should not be used as a cudgel to achieve *any* specific outcome in the public marketplace of ideas; the PTO should simply grant trademarks on their own merits and let the chips fall where they may.

To begin with, this justification is difficult to square with the backwards-looking focus of the disparagement clause. If the clause's goal is to prevent the "disrupting" force of being "bombarded" with disparaging messages in the marketplace, one might assume that the meaning of a term *today* should be the relevant inquiry. Instead, decision makers focus on the meaning of a term when a mark was originally registered, which in some cases can be decades ago. *See, e.g.*, *Pro-Football, Inc. v. Blackhorse*, 112 F. Supp. 3d 439, 472 (E.D. Va. 2015) (attempting to ascertain whether "redskin" was disparaging in 1967).[21] Such an approach is starkly at odds with the supposedly urgent need to stamp out disparaging messages being transmitted *today*, raising serious doubts as to whether such a goal is really the compelling interest the government claims.

Rather than promoting an offense-free marketplace, the goal of the trademark system is quite simple: for people to know what they're buying. This goal is *aided*, not diminished, by allowing artists and brands to choose (and own) an identity that accurately characterizes their work.

What if The Slants had chosen a less controversial name, as the government apparently wishes they had? Suppose instead of calling themselves "The Slants," the band played it safe and called themselves "Four Asian-American Men Who Are Very Respectful of Our Diversity as a Nation." Someone attending a show by such a band might well find it *more* "destabilizing" to only then discover that the band's songs contain lyrics referencing the schoolyard taunt "Chi-

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[21] Couldn't the Redskins controversy be obviated by keeping the name but replacing the logo with a smiling potato head?

nese, Japanese, dirty knees, look at these." Resp. Cert. Brief 4.

In other words, brand names are how artists can encapsulate their tone and their ethos as succinctly as possible. People who showed up to watch a (now defunct) band called Anal Cunt knew they were probably not getting a cover of "Careless Whisper." People who show up to watch The Slants know they're getting a take on Asian-American identity that's irreverent and sometimes politically incorrect. Rather than "destabilizing" the market, their brand gives consumers information and prevents confusion, which are exactly the goals of the federal trademark system.[22]

Finally, even if the use of such marks does cause hurt and offense to some, punishing speech to prevent such offense is simply not permissible under the First Amendment. Suppose that instead of punishing trademarks, the government had made exactly the same arguments in favor of punishing certain public picketers who express disparaging statements (but not those who express positive statements). Such a punishment would obviously be unacceptable. "[T]he Constitution does not permit the government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer. Rather, the burden normally falls upon the viewer to avoid further bombard-

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[22] Perhaps what the government truly finds "destabilizing" is not the existence of trademarks like "The Slants," but the actual product and message on offer in their performances themselves. Of course, the government could not admit this as a goal of banning disparaging marks and economically harming those artists who would be inclined to use them; even the government knows that discouraging "disparaging" songs and artwork could never pass First Amendment scrutiny, right?

ment of his sensibilities simply by averting his eyes." *Snyder v. Phelps*, 562 U.S. 443, 459 (2011) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 210–211 (1975) (alterations omitted)). This principle is no less true whether the expression appears on a placard, billboard, or flyer promoting a performance. The First Amendment does not allow the government to punish disfavored messages so others will not see them.

CONCLUSION

Amici, and all others who sometimes find themselves lumped into a basket of deplorables—now that's a great band name!—urge the Court to let people judge for themselves what's derogatory.

Respectfully submitted,

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APPENDIX: DESCRIPTION OF *AMICI*

The **Cato Institute** is a non-partisan public policy research foundation that was established in 1977 to advance the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was founded in 1989 to restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato holds conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

P.J. O'Rourke is one of America's leading political satirists, an H.L. Mencken Research Fellow at the Cato Institute, and an equal-opportunity offender. Formerly the editor of the *National Lampoon*, he has written for such offensive publications as *Car and Driver*, *Playboy*, *Esquire*, *Vanity Fair*, *House & Garden*, *The New Republic*, *The New York Times Book Review*, *Parade*, *Harper's*, and *Rolling Stone*. He is a contributing editor at *The Weekly Standard* and a member of the editorial board of *World Affairs*. O'Rourke's books have been translated into a dozen languages and three have been *New York Times* best-sellers: *Parliament of Whores*, *Give War a Chance*, and *All the Trouble in the World*. He is also the author of the forthcoming *How the Hell Did This Happen?: The Election of 2016*—in which he disparages both the ruling class and unwashed masses, yet still hopes to enforce his intellectual-property rights.

Nadine Strossen holds the John Marshall Harlan II Chair at New York Law School, was president of the American Civil Liberties Union from 1991 through 2008, and continues to serve on the ACLU's National Advisory Council. She also holds leadership positions in other organizations that focus on free

speech issues, including the Foundation for Individual Rights in Education. Strossen's extensive writings that defend freedom for offensive expression include her book, *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights* (Scribner 1995) and her co-authored book, *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (NYU Press 1994). Her ideas on this and other topics have many times been deemed sufficiently offensive to trigger boycotts, dis-invitations, and picketing, as well as death threats.

Erik Nielson is an associate professor of liberal arts at the University of Richmond. He has published widely on African-American music and poetry, with a particular emphasis on rap. He is co-editor of *The Hip Hop & Obama Reader* (2015) and co-author of *Rap on Trial* (forthcoming). He writes regularly on race, politics, and popular culture for national media outlets such as the *New York Times*, *Washington Post*, *Atlantic*, and *Rolling Stone*. He has served as an expert witness or consultant in dozens of criminal cases involving rap music as evidence, and he was the lead author of two *amicus* briefs before the Supreme Court on the history and conventions of rap (*Elonis v. United States* and *Bell v. Itawamba County School Board*). His work often requires him to explain why rhetoric that sounds "derogatory" actually isn't—or why rhetoric that sounds benign is actually quite nasty. It's all very complicated, and probably not something the PTO is going to clear up anytime soon.

Clay Calvert is the Brechner Eminent Scholar in Mass Communication at the University of Florida. He also directs the Marion B. Brechner First Amendment Project, in which capacity he has filed many

Supreme Court *amicus* briefs, in cases such as *Elonis v. United States* and *Brown v. Entertainment Merchants Association*. His scholarship focuses on freedom of expression, and he has published multiple journal articles regarding offensive speech—including ones featuring interviews with *Hustler* publisher Larry Flynt and several porn stars. Because "Clay" is a four-letter word, he found himself fixated at an early age by the offensive and profane. Furthermore, because he was born without a middle name—his parents reportedly were too poor to afford one—he has always been slightly bitter and, in turn, prone to engage in offensive expression himself. Finally, Calvert's highest academic honor is itself somewhat offensive to the puritanical and prudish: a former student at the University of Florida who took his undergraduate media-law class later adopted his last name for her stage name in the adult-movie industry, where she performs today as Casey Calvert.

Ralph Steadman, born in Liverpool in 1936, discovered his love of drawing as a child, when he recalls visiting the home of a friend whose "mother allowed him to express himself all over the walls . . . scribble, scribble, scribble." Steadman's award-winning output over the last 50-plus years has been expressed in many forms: drawings, paintings, cartoons, collage, photography, sculptures, sets, and costume designs. Steadman began collaborating with Hunter S. Thompson in 1970 when Warren Hinckle III, cofounder of *Scanlan's Monthly*, identified Steadman as the perfect artist to illustrate Thompson's article on the Kentucky Derby. Thompson had suggested that what they needed was "somebody with a really peculiar sense of humor, because this is going to be a very twisted story. It'll require somebody with a serious

kink in his brain." The article was hailed by the *Boston Globe* as "pure GONZO." In 2012, Johnny Depp narrated For No Good Reason, a documentary of Steadman's life and work. For Steadman, the freedom of speech and expression "are as fundamental to our being as the alphabet itself." He lives with his wife Anna in a castle in Kent, England.

Flying Dog Brewery is a craft brewery located in Frederick, Maryland. Founded in 1990, it is the largest brewery in Maryland and, as of 2015, the 37th largest in the country. Flying Dog is known for its connection to "gonzo journalism" through close ties to Hunter S. Thompson and Ralph Steadman. Flying Dog's beer names and artwork have often been interpreted as vulgar and insinuating, which has led to controversies with government agencies. In 1995, while drawing the first "Road Dog" label, Steadman splashed "Good Beer, No Shit" across the back. (This was an indirect reference to an ancient Celtic axiom that Thompson included in his short essay memorializing the release of Flying Dog's first beer with Steadman's artwork.) The Colorado Liquor Board removed the bottles from shelves, citing "obscenity," but allowed them back five years later. In 2007, Arkansas wouldn't allow the sale of "In Heat Wheat" because of both the name and label image. In 2009, Michigan denied Flying Dog the licensing right to sell its 20th Anniversary beer, "Raging Bitch" (a Belgian-style IPA, now its best seller), finding that the label was "detrimental to public health, safety and welfare." After losing before the Sixth Circuit on the issue of qualified and quasi-judicial immunity, *Flying Dog Brewery, LLLP v. Mich. Liquor Control Comm'n*, 597 Fed. Appx. 342 (6th Cir. 2015), the state commission relented. With the damages awarded from that

case, Flying Dog established the 1st Amendment Society, which advocates and educates on the First Amendment and organizes events that promote the arts, journalism, and civil liberties.

The **Comic Book Legal Defense Fund** is a nonprofit organization dedicated to the protection of the First Amendment rights of the comics art form and education that creates awareness about those rights. With a membership that includes comic book retailers, creators, publishers, educators, librarians, and readers, the CBLDF has defended dozens of First Amendment cases in courts across the United States, and led important education initiatives promoting comics literacy and free expression.

Thomas Jefferson warned that "[t]he natural progress of things is for liberty to yield, and government to gain ground." Letter from Thomas Jefferson to Edward Carrington (May 27, 1788). Mindful of this trend, the **DKT Liberty Project** was founded in 1997 to promote individual liberty against encroachment by all levels of government. This not-for-profit organization advocates vigilance over regulation of all kinds, particularly that which constrains First Amendment rights.

Reason Foundation is a nonpartisan and nonprofit public policy think tank, founded in 1978. Its mission is to promote free markets, individual liberty, equality of rights, and the rule of law. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, www.reason.com, www.reason.org, and www.reason.tv. To further its commitment to "Free Minds and Free Markets," Reason participates as *amicus curiae* in cases raising significant legal and constitutional issues.